IN THE

UNITED STATES

Court of Appeals

FOR THE NINTH CIRCUIT

SCOTT PUBLISHING COMPANY, a corporation, *Appellant,*

vs.

RALPH RODGERS, Trustee in Bankruptcy of Mid-Columbia Publishers, Inc., Bankrupt, *Appellee.*

No. 14,759

BRIEF OF APPELLEE

Upon Appeal From the United States District Court
For the Eastern District of Washington
Southern Division.

THOMAS MALOTT,
Attorney for Appellee.
708 Spokane and Eastern Building
Spokane 1, Washington

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ADDITIONAL STATEMENT OF THE CASE

We feel that the facts can be presented in simpler form.

Appellee is the trustee in bankruptcy of Mid-Columbia Publishers, Inc., a bankrupt, sometimes herein called the bankrupt, and succeeded Ernest R. Crutcher, the original trustee.

As trustee Crutcher commenced an action against appellant in the Superior Court of the State of Washington, for Franklin County (R. 13), to recover for conversion of items of property, destruction of a going business, and the conversion of a Model 34 Mergenthaler linotype machine (R. 14). The conversion took place on June 11, 1949 (R. 14). The case was tried to a jury, which found that the value of the linotype approximated $14,000 (R. 15). The linotype machine, on June 11, 1949 was encumbered by a mortgage given to Mergenthaler Linotype Company, on which the unpaid balance was $8,550.

The action was tried during the month of March, 1952 (R. 15). The trustee sought to recover the full value of the linotype, without deductions for encumbrance. At the time of the trial appellant had assumed said mortgage and had made certain payments thereon. Appellant, however, in said Superior Court trial did not show such assumption of mortgage indebtedness, nor did it show that it had been and was paying said indebtedness (R. 14, 15), nor is there any evidence of its exonerating the trustee, or the bankrupt itself, from liability on account of such mortgage indebtedness. Although it was admitted that the mortgage aforesaid had been given, the record was totally devoid of any evidence that the mortgage

would have been valid as against the trustee (no showing of compliance with the ten-day filing statute, technical requirements for execution of mortgage in the state of Washington, etc). There was no evidence presented that the mortgagee had absolved the bankrupt or the trustee of its right to prove a claim against the bankrupt estate and thereby surrendered its right to share in the assets available to other creditors.

At the conclusion of the Superior Court trial the trial judge gave its Instruction 29, which reads:

> "If you find for the plaintiff for any sum by reason of alleged conversion of any property . . . the plaintiff is entitled to recover the fair cash market value of such property at the date of the alleged conversion thereof, *less any lien indebtedness thereon.*" (Italics ours. R. 41-42)

Crutcher excepted to this instruction.

The jury, by special verdict, deducted from the recovery allowed to plaintiff the sum of $8,550 on account of such mortgage indebtedness (R. 15). From a judgment in favor of Crutcher, as trustee, against appellant, there was an appeal. The trustee cross appealed from the action of the court in instructing the jury to deduct the sum of $8,550 (R. 15).

On appeal the judgment of the trial court as against appellant was affirmed, but on the trustee's cross appeal it was ordered that the sum of $8,550 be added to the judgment (R. 15-16). In holding that the trial judge erred in instructing the jury to deduct the mortgage debt, the court stated:

> ". . . A person who is entitled to bring an action for a conversion, although he has a limited interest in the property converted, may, as against a stranger, recover the full value of the property." (Citing several cases. R. 40-41).

The court further stated:

> "If appellant wanted credit for $8,550 on the judgment, it had the burden of showing that it had paid that amount or had exonerated Mid-Columbia from all liability therefor; and that appellant failed to do. It was therefore error to offset that amount against the judgment." (R. 41).

In a petition for rehearing before the Supreme Court appellant urged that the effect of granting the cross appeal would be to unjustly enrich the trustee and appellant petitioned for a remanding of the case to the trial court to permit the taking of evidence to establish that it had assumed and agreed to pay the mortgage, was paying the same, and would pay the same. This petition for rehearing was denied (R. 16). Appellant thereupon paid the judgment of $8,550 and immediately filed a petition in the bankruptcy proceedings, praying for an allowance of $8,550 upon the theory that the trustee had been unjustly enriched (R. 17). The Referee dismissed the petition. At the hearing before the Referee, the Referee found, and to the quoted finding no error is specified by appellant, that:

> "All matters and things adduced at the hearing before this Court pertaining to the mortgage indebtedness owing to Mergenthaler Linotype Company by the bankrupt and the assumption agreement signed by the petitioner were known to the petitioner

at the time of trial of said Superior Court action." (R. 46-47).

Upon review to the Honorable William J. Lindberg, United States District Judge, the order of the Referee was affirmed (R. 18-19).

ARGUMENT

FOREWORD

We have read and reread appellant's brief. Squarely confronted with the bar of res judicata, appellant attempts to sidestep that issue with its theory of unjust enrichment. If the doctrine of res judicata is to be so easily circumvented, appellant's theory would hold in almost any case and the doctrine of res judicata would be cast aside. We comment at the outset that although appellant's case is bottomed on the proposition that appellee has been unjustly enriched, it cites not a single case in which this theory has been adopted to give a litigant a second trial upon issues which could and should have been settled in the first trial. Here appellant had its day in court. It chose not to offer evidence which was available to it and now, six years after the conversion, it seeks to retry those issues before this Court.

1. RIGHT OF PETITIONER TO RESTITUTION OR EQUITABLE RELIEF.

Although appellant's case is bottomed on the proposition that appellee has been unjustly enriched and that a person unjustly enriched must make restitution of the amount enriching him to the person entitled thereto, it

cites no case in which the theory of unjust enrichment has been employed to give a litigant a second trial against his opponent. To do so would do away with the principle that,

> "The law requires that there shall be an end to litigation, and where a party has had a full and fair opportunity to make all of the defenses at his command and he elects not to disclose his claims . . . the doctrine of res judicata applies and he cannot later assert."—*Symington v. Hudson,* 40 Wn. (2d) 33, 243 P. (2d) 484.

The reviewing judge realized this when he cited the following section:

> *Restatement of Restitution,* Sec. 146, p. 585: "A cause of action for restitution against another is terminated by a valid judgment on the merits in favor of the other if the judgment is not reversible or subject to direct independent attack and if it was rendered in a litigation between the two parties in which the existence and extent of the duty were issues that were or could have been finally determined."

It is stated at page 18 of appellant's brief, under this heading, that the remedy by way of restitution for unjust enrichment "is just as broad as any situation which gives rise to its application." We will hereafter point out how erroneous this statement is.

2. FULL FAITH AND CREDIT.

Despite appellant's protests, neither the Referee in Bankruptcy, the United States District Court, nor this Court is a part of the judicial system of the State of Washington. Nor does an appeal lie from a judgment

of the Supreme Court of the State of Washington to any of the above United States courts.

Ever since the celebrated opinion of Mr. Justice Story in *Mills v. Duryee,* 7 Cranch 481, 3 L Ed. 411, federal courts have held that under Article IV, Section 1 of the United States Constitution, full faith and credit must be given to judgments of state courts in the same manner as the courts of the state wherein judgment is entered would give to their own, state court, judgments. This court has so held with reference to Washington judgments. *Mitchell v. Cunningham,* 8 F. (2d) 813 (9th Cir). A final judgment of a state court cannot be questioned by a federal court for errors which do not affect the jurisdiction of the state forum. *U. S. v. Eisenbeis,* 112 Fed. 190 (9th Cir). This court held, in *Sanger Lumber Company v. Western Lumber Exchange,* 11 F. (2d) 489 (9th Cir), that federal courts cannot act as reviewing tribunals of Washington judgments. Moreover, even if there were a substantial federal question in the instant case, which there is not, had the state court ruled upon the question the judgment of the state court would be final. *Campbell River Mills Co. v. Chicago Milwaukee St. Paul and Pacific Railroad Co.,* 42 F. (2d) 775, affirmed 53 F. (2d) 69 (9th Cir).

We submit, therefore, that what appellant is attempting to do here is obtain a second trial before federal courts and thus lead the federal courts to the violation of the full faith and credit clause.

3. THIS PROCEEDING IS A COLLATERAL

ATTACK ON THE JUDGMENT OF A STATE COURT AND INVOLVES MATTERS WHICH WERE OR SHOULD HAVE BEEN LITIGATED IN THE STATE COURT.

Below we set forth the language of the Supreme Court of the State of Washington in cases involving the doctrine of res judicata.

> "Rule forbidding collateral impeachment of judgment by court of competent jurisdiction applies to all questions within issues which were before court and which were, or might have been, there adjudicated."—*Baskins v. Livers,* 181 Wash. 370; 43 P (2d) 42.

> "A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon parties to litigation and their privies, and they are not allowed afterwards to revive controversy in new proceedings for purpose of raising same or any other question, matter in dispute having become res judicata, and judgment of court importing absolute verity."—*Pacific Telephone & Telegraph Co. v. Henneford,* 199 Wash. 462, denying motion 195 Wash. 553, certiorari denied 59 S. Ct. 483, 306 U. S. 637, 83 L. Ed. 1038; 92 P (2d) 214.

> "The doctrine of 'res judicata' rests upon ground that a matter which has been litigated or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again."—*Walsh v. Wolff;* 32 Wn. (2d) 285; 201 P. (2d) 215.

> "When judgment has been rendered, all rights of litigants are merged in it."—*Fisher v. Schwabacher Hardware Co.,* 109 Wash. 257; 186 Pac. 649.

"A judgment bars not only every defense actually raised or set up in the action, but every other defense which might have been urged therein."—*Stallcup v. City of Tacoma,* 13 Wash. 141; 42 Pac. 541 *Northern Pac. R. Co. v. Spokane County,* 22 Wash. 698; 60 Pac. 1135.

"A losing party cannot try his case over again in a countersuit because he was unprepared originally" —*Kellogg v. Maddocks,* 1 Wash. T. 407;

"A judgment on the merits concludes the parties and their privies, not only as to the things determined, but as to matters which might have been litigated."—*Olson v. Title Trust Co.,* 58 Wash. 599; 109 Pac. 49; *McPherson Bros Co. v. Okanogan Co.,* 61 Wash. 239; 88 Pac. 199; *State v. Superior Court for Thurston Co.,* 62 Wash. 556; 114 Pac. 407; *Merz v. Mehner,* 67 Wash. 135; 106 Pac. 1118; *Hawkins v. Reber,* 81 Wash. 79; 142 Pac. 432.

"Where the mortgage was found to have been forged in an action to foreclose it and the mortgage did not preserve error in denying a claim of lien for taxes paid in good faith, and the findings made no reference to taxes, the judgment was res judicata on the right of the mortgagee to a lien, as the question could have been determined."—*Union Cent. Life Ins. Co. v. Chesterley,* 100 Wash. 260; 170 Pac. 558.

"A judgment or decree on the merits, rendered in a former suit between the same parties and their privies upon the same cause of action, by a court of competent jurisdiction, is conclusive, not only as to all matters determined, but also is conclusive as to matters which might or ought to have been litigated." *Woodland v. First Nat. Bank,* 124 Wash. 360; 214 Pac. 630 *Judish v. Rovig Lumber Co.,* 128 Wash. 287; 222 Pac. 898.

"Where causes of action are same, the rule of res

judicata applies, not only to questions presented but to all matters which rightfully belong to litigation which parties could, by exercising reasonable diligence, have presented at trial."—*Metropolitan Life Ins. Co. v. Davies,* 2 Wn. (2d) 155; 97 P. (2d) 686.

"Doctrine of res judicata applies, not only to matters actually adjudicated, but to controversies within scope of issues which might have been tried."—*Anderson v. National Bank of Tacoma,* 146 Wash. 520; 264 Pac. 8 *Anderson v. Peterson,* 147 Wash. 698; 265 Pac. 1118.

At pages 24 and 25 of appellant's brief, in the quotation from *Commissioner v. Sunnen,* 333 U. S. 591, 92 L. Ed. 898, 68 Sup. Ct. 715, lies appellant's entire argument. This argument uses as a basis the rule of law that in an action on a *different claim or demand,* a judgment does not operate *as an estoppel* as to matters which might be litigated but only as to matters in issue or points controverted, upon the determination of which the verdict was rendered. This rule of law is itself appellant's undoing for in relying on it appellant presumes that this action is on a "claim or demand" different from that considered by the courts of Washington.

On the contrary, here we have the same matters in issue and points controverted in the trial of the former cause, where these matters were prosecuted to a jury verdict and there was even a special interrogatory answered by the jury on the very issue in question. (R. 15).

In *Baker v. Cummings,* 181 U. S. 117, 45 L Ed. 776, 21 S. Ct 578, plaintiff sued on an account. Before defendant pleaded to the complaint he brought an independent ac-

tion against plaintiff to obtain an accounting, setting up in the pleading the existence of a law partnership between the parties and certain fraud of the plaintiff which, had it been interposed in the principal action, would have constituted a ground for a setoff. Defendant received judgment in the other suit for a sum of money, after deduction of the amount claimed by plaintiff in the principal suit. Plaintiff appealed to the Supreme Court of the United States from the judgment in favor of the defendant. The principal action was pending all this time. The Supreme Court dismissed the entire case on the merits. In the principal action the plaintiff set up the dismissal of the second suit as res judicata of defendant's right to set off the former demand in the principal case. The court especially noted that the former appeal opinion was, in effect, a decision in plaintiff's favor on the issues presently tendered by way of setoff in that defendant had failed to prove his case and in that the former case was dismissed by the Supreme Court for failure of the defendant to introduce sufficient evidence to entitle him to relief. The Supreme Court therefore held that the former dismissal was res judicata of the defendant's right to use the setoffs as a defense, which formerly were the basis of defendant's unsuccessful suit. It is clear that this case is controlling though it is just the reverse of the situation we have here.

The issue at the time of the trial, according to the decision of the Supreme Court of Washington in the *Crutcher* case was whether the bankrupt, and consequently its estate, had been exonerated from liability on the

mortgage debt. (1) There was no proof of such exoneration; (2) the Supreme Court of the State of Washington was not presented with an offer to prove this exoneration; and (3) the Supreme Court of the State of Washington in a final judgment refused to allow the trial court to receive further proof of the mere fact of payment or, for that matter, of any facts pertinent to the case which appellant failed to prove when it had an opportunity to do so. Those issues are the law of this case. *Kennett v. Yates,* 45 Wn. (2d) 35, 272 P. (2d) 22; 28 Wash. Law. Rev. 137.

As will be seen from the authorities hereinafter set forth, the test in cases like this one is always: Were the facts relied on in the collateral proceeding available to the plaintiff in the former case? If they were, and were not adduced in the former proceeding, then plaintiff cannot have a second chance.

In *Restatement of Judgments,* Sec. 126, p. 610, is the rule which is decisive of this appeal:

> "Although a judgment is erroneous and inequitable, equitable relief will not be granted to a party thereto on the sole ground that . . . . (d) evidence has been discovered not previously available, or that (e) the judgment was the result of a mistake of law or of fact by the Court, or by the present complainant or his attorney. . ."

It is the opinion of the American Law Institute, therefore, that even though "evidence" which would change a judgment is discovered *after* the judgment, a court of equity will not under any circumstances give equitable relief from the legal effect of the judgment.

Appellee may have had a defense to the former action insofar as the right of setoff or reduction of the measure of damages by the amount of the mortgage debt is concerned, but whether there was a failure of proof or not, and whether the Supreme Court of the State of Washington was right or wrong in holding as it did, this Court cannot now question the judgment of that court.

What appellant is attempting to do here is obtain a new trial of an identical issue of fact on the ground that evidence exists, *and did then exist,* which was not presented to the courts of Washington. Even had this evidence been unavailable at the time of the trial and were now to be classified as "newly discovered evidence," this Court could grant no relief.

In a note in 149 ALR 1195, the rule is stated to be well settled that the effect of a judgment as res judicata may not be avoided on the ground of newly discovered evidence. At page 1201 of the annotation the author states:

> "The rule that the discovery of new evidence does not affect the doctrine of res judicata also applies where a judgment is relied on as precluding, by way of collateral estoppel, the litigation of an issue essential to and litigated, and determined by, former judgment."

The Washington rules applicable to this particular case are set out in *Curtis v. Crooks,* 190 Wash. 43, 66 P. (2d) 1140:

> "The dictrine of *res adjudicata* was first definitely formulated in the *Duchess of Kingston's* case, and, as stated in 34 C. J. 743, embodies two main rules which are stated as follows:

" 'The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal."

" 'Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.'

" . . . . . .

" 'Test of Identity of Cause of Action.—If it is doubtful whether a second suit is for the same cause of action as the first, it has been said to be a proper test to consider whether the same evidence would sustain both. If the same evidence would sustain both, the two actions are considered the same, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form. If, however, different proofs would be required to sustain the two actions, a judgment in one is no bar to the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has been designated as infallible. Sometimes the rule is stated in the form that the test of the identity of causes of action for the purpose of determining the question of res judicata is the identity of the facts essential to their maintenance.' 15 R.C.L. 964, Sec. 439.

" 'In *Buddress v. Schafer, supra* (12 Wash. 310, 41 Pac. 43), it is said:

" 'To determine whether a former judgment is a bar to a subsequent action, it is necessary to inquire

> whether the same evidence would have maintained both of such actions.'
>
> "'It is unnecessary to multiply authorities. This principle is laid down by every text writer and sustained by all authority. It is the primary test of *res judicata*. *Mallory v Olympia,* 83 Wash. 499, 145 Pac. 627'."

It will be seen, then, that the test of the identity of the causes of action is met in this case. To prevail in this action appellant must urge the same facts which appellant could and should have urged in the state court (which facts would have constituted a pro tanto defense in the sum of $8,550).

In the following section we will show that the court must follow Washington law in this case.

Let us consider two leading Washington cases on this subject. In *Holt Manufacturing Co. v. Coss,* 78 Wash. 39, 138 Pac. 322, plaintiff unsuccessfully sued a sheriff for conversion of property upon which plaintiff claimed a lien as a mortgagee.

An attaching creditor caused defendant sheriff to levy on certain wheat of the debtor Schoenrock on September 13, 1911. This creditor received a judgment on October 6, 1911, and execution issued that day. The same day plaintiff mortgagee received a judgment of foreclosure and execution issued on the wheat, with instructions to the defendant sheriff to sell it to satisfy plaintiff's lien. The mortgage was executed November 10, 1910. Because the attachment was later, clearly the mortgage, on those facts, was entitled to priority. The two actions were com-

pletely independent of each other, and neither the mortgagee nor the attaching creditor was a party to the action of the other. Ten days after the two executions, the attaching creditor sued defendant sheriff and plaintiff mortgagee to enjoin the sale under the foreclosure and to have the attachment declared superior to the lien of the mortgage. On November 22, 1911, and following the institution of the attaching creditor's action, the debtor Schoenrock was adjudicated a bankrupt. *The following day* the Superior Court action involving priorities of the two liens was submitted to the court on stipulated facts, and on November 27 the court erroneously decreed the attachment lien to be superior to the mortgage lien. Plaintiff mortgagee (defendant there) did not appeal this decision nor (in the stipulated facts) was the court advised that debtor Schoenrock had been adjudicated a bankrupt. The defendant sheriff, pursuant to the decree, sold the wheat.

The Supreme Court of the State of Washington expressly bypassed the question of whether Section 67 of the Bankruptcy Act, which makes void all liens by legal proceedings against the bankrupt's property obtained within four months preceding bankruptcy, was for the benefit of the trustee alone or could be used by other creditors to establish their priority. The attachment was, of course, within four months from the date of bankruptcy.

The decision of the court rested entirely on res judicata and the court held that since the facts were being urged in the instant proceeding were in existence at the time of the former proceeding and could have been urged to

the court at that time in support of the plaintiff's position, the matter was res judicata. Said the court:

> "That judgment not being appealed from, it is necessarily final as to the superiority of the Inland Trading Company's lien insofar as that question could be affected by *facts in existence at the time of the rendition of that judgment. . .*" (Italics are those of the court).

> "It is suggested that the bankruptcy adjudication occurring but shortly before the submission of the question of the superiority of the respective liens of appellant and the Inland Trading Company, counsel did not know of the existence of such adjudication and therefore had no opportunity to bring the fact to the attention of the superior court. We have no facts here showing what counsel's knowledge was as to that fact; but, assuming that they had no such knowledge, such fact would only argue that appellant, Holt Manufacturing Company, might be entitled to a new hearing upon the ground of newly discovered evidence and surprise which prevented it from obtaining the judgment it may have been entitled to in the superior court.

> "We have, then, a judgment of the superior court upon the very question here presented, which has not been appealed from nor sought to be revised in any manner, and no new fact coming into existence since the rendering of that judgment which is material to the controversy, to-wit, the question of the superiority of the respective liens of appellant and the Inland Trading Company. It is strenuously insisted that there is not here presented the same question as in the former case before the superior court of Adams county. We are unable to see that such is the fact. The real question there involved was the superiority of these respective liens. That is, in its final analysis, the exact and only question here, as it was there,

involved. Counsel for appellant rest their whole case here upon the theory that appellant's foreclosure lien is superior to the attachment and judgment lien of the Inland Trading Company, and they seek to so show by evidence of facts, to-wit, the bankruptcy adjudication which was in existence and might have been brought to the attention of the superior court in the prior action where the question of superiority of the respective liens was involved. Counsel invoked the rule as stated in 23 Cyc. 1290, as follows:

" 'The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.'

"The trouble with counsel's contention is that the rule is not applicable here, because the claimed new fact relied upon in support of appellant's foreclosure lien, to-wit, the bankruptcy adjudication of Schoenrock, is not a new or additional fact coming into existence after the rendition of the judgment of the superior court, but is a fact which was then in existence. To be now influenced by that fact in this case would be but to retry what was already tried by the superior court, upon evidence which was then in existence and which was admissible upon that trial. In 23 Cyc. 1291, immediately following the statement of the rule invoked by counsel for appellant, we read:

" 'But if a point or question was in issue and adjudicated in a former suit, a party bound by the judgment cannot escape the estoppel by producing at a second trial new arguments or additional or different evidence in support of the proposition which was decided adversely to him.'

"On the question of identity of issues, or causes of action, where a controversy is claimed to have been rendered *res adjudicata* by a former judgment, in 2 Black on Judgments (2d ed.) Sec. 726, it is said:

" 'For the purpose of ascertaining the identity of the causes of action, the authorities generally agree in accepting the following test as sufficient: Would the same evidence support, and establish both the present and the former cause of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of the second action.'

"We are of the opinion that the question here involved has been finally determined against appellant by the former judgment of the superior court for Adams county. Whether that judgment was erroneously rendered, or whether it could have been reformed because of mistake or newly discovered evidence, is wholly foreign to the problem here for solution. Of course, respondent in this case stands in the shoes of the Inland Trading Company so far as appellant's rights are concerned."—*Holt Manufacturing Company v. Coss,* 78 Wash. 39, 138 Pac. 322.

The second case we believe to be controlling is *Symington v. Hudson,* 40 Wn. (2d) 331, 243 P. (2d) 484. Defendant sued plaintiff in a former action to quiet title. Plaintiff answered and testified but did not plead or mention the fact that he held a tax certificate to the property on which the redemption period had not expired. At that time, according to the court, plaintiff then had an inchoate title which had not yet ripened by the issuance of a city treasurer's deed. Defendant prevailed in the former action and received a decree quieting title in him, the court having rejected two defenses which plaintiff had pleaded. Thereafter, upon the issuance of a treasurer's

deed to him, plaintiff sued defendant, setting up his title to the property by virtue of the treasurer's deed which was acquired after the decree in the former action. Said the Court:

> "The gravamen of the action was a determination of all of the interests in the property claimed by the defendants. The action was not aimed at a particular piece of evidence but was directed to all of the pretensions of Mr. Symington to the title. It put him to a disclaimer or to allegations and proof of all of the interests which he claimed to the property, the nature of which were known to him, or by the use of diligence, could have been known. *Watson v. Glover,* 21 Wash. 677, 59 Pac. 516.
>
> "In *Burke Motor Co. v. Lillie,* 39 Wn. (2d) 918, 239 P. (2d) 854, we held that to have a judgment *res judicata* in a subsequent action there must be a concurrence of identity in four respects: (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made.
>
> "We have here the same subject-matter, the same parties, and the same quality of persons. The causes of action in the two actions to quiet title were the same: the determination of the superior title to the property based upon facts, all of which were in existence at the time of the first judgment, and which were, or could have been, litigated therein. The judgment in the first action operated upon every claim which properly belonged to the subject of the litigation. *Sayward v. Thayer,* 9 Wash. 22, 36 Pac. 966, 38 Pac. 137. As we have pointed out heretofore, Mr. Symington owned the certificate of purchase at the time of the first action. It properly belonged to the subject-matter of that litigation. The law requires that there shall be an end to litigation, and

> where a party has had a full and fair opportunity to make all of the defenses at his command, and he elects not to disclose his claim, as did Mr. Symington, the doctrine of *res judicata* applies and he cannot later assert it *Youngquist v. Thomas,* 196 Wash. 444, 83 P. (2d) 337. The judgment was conclusive upon the issue of the paramount title and of everything that might have been urged for or against such title."

4. PETITIONER IS BARRED FROM EQUITABLE RELIEF BECAUSE IT DOES NOT COME INTO COURT WITH CLEAN HANDS.

The opinion of the Supreme Court of the State of Washington in the instant case, 42 Wn. (2d) 89, 253 P. (2d) 925, dealt with this very problem. Appellant there attempted to establish, doubtless anticipating this very obstacle in this Court, that its conversion was unintentional and inadvertent. The Supreme Court stated that this was "far from the situation in the present case" and held that appellant's assumption that its wrongful act in this case was "not a willful conversion" was "an unwarranted assumption." Appellant having taken the bankrupt's property, having stationed a man armed with a shotgun outside the bankrupt's place of business, and having according to the opinion of the Supreme Court of the State of Washington, thrown the company into bankruptcy ("its principal asset gone, Mid-Columbia was soon in bankruptcy. . ."), we do not see how this Court can say to the trustee that the tortfeasor — appellant — approaches this Court, a court of equity, with the clean hands necessarily precedent to the extraordinary relief it asks.

5. PETITIONER HAS FAILED TO SHOW IN THIS COURT EXONERATION OF THE BANKRUPT ESTATE.

The law of this case, according to the Supreme Court of Washington, is that appellant could only have obtained credit for the $8,550 mortgage debt had it proved that

> ". . . . it had paid that amount or had exonerated Mid-Columbia from all liability therefor;. . ."

It is interesting to note that the Referee found that as of May 15, 1953, appellant had reduced the mortgage debt to $3,150 but that no evidence was offered, either in the petition for rehearing filed in the Supreme Court nor in the agreed Statement on appeal in this Court, that the bankrupt estate was exonerated from liability to the mortgagee. In the agreed Statement (R. 17) it is stated that the petition to the Referee stated appellant was "willing to hold the trustee harmless from any liability therefor," but not that it had done so. In short, there is nothing in this record, after many courts have ruled on this case, in the nature of an indemnity to the trustee from the provable claim of the mortgagee.

6. IN DETERMINING QUESTION OF RES JUDICATA THIS COURT MUST FOLLOW THE LAW OF WASHINGTON.

The law of res judicata of the Supreme Court of the State of Washington is the controlling law in this case to the exclusion of all federal cases, including cases from this Court announced prior hereto, should this Court de-

termine that the law announced in any of these cases is contrary to the law of the State of Washington.

There is no "federal common law" on res judicata. Under the *Tompkins* case, Washington case law must be followed here.

In *Caterpillar Tractor Co. v. International Harvester Co.* (3rd Cir) 120 F. (2) 82, 138 ALR 1, the court held:

> "The extent of the collateral consequences of a judgment is a matter of law, and in the absence of statute, judge-made law. The law must be the law of some sovereignty for nowadays we all reject the notion of law characterized by Mr. Justice Holmes as 'a brooding omnipresence in the sky'. *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 ALR 1487. There is certainly very limited scope for a 'general common law' of the United States. Therefore, the question of the effect of the prior judgment is to be determined in the first instance by the law of Nevada where the court rendering it sat."

What we have heretofore stated under this section applies with equal force, of course, to the law regarding the measure of damages for conversion where the converted property is subject to a mortgage, as announced in *Crutcher v. Scott Publishing Co.,* 42 Wn. (2d) 89, 253 P. (2d) 925. That case announced the law applicable to this one insofar as appellant's burden of proof is concerned, and therefore, when the Supreme Court of the State of Washington announced, as it did in the *Crutcher* case, that Scott Publishing Company had failed to support its claim with evidence, the Supreme Court expressed a rule of law which this Court must follow.

7. THE RECORD IS ENTIRELY DEVOID OF EVIDENCE THAT THE MORTGAGE WOULD HAVE BEEN VALID AS AGAINST THE RIGHTS OF THE TRUSTEE.

Neither during the course of the trial in the Superior Court action nor in the proceedings before the Referee did appellant offer any proof whatsoever that the mortgage would have stood up as against the rights of the trustee under Section 70 of the Bankruptcy Act. Had it not been for the conversion, the trustee would have taken over the linotype machine and under Section 70A (5) of the Bankruptcy Act he would have taken it free from the mortgage unless such mortgage had met the statutory requirements. As we have already mentioned, there was a complete lack or absence of proof upon the proposition that the mortgage was valid as against the trustee.

Appellant was not in such a favored position and would merely have taken such rights as the bankrupt had. It is therefore quite conceivable that even had this matter been fully litigated in the original trial, the mortgage would have been determined to be invalid against the trustee and, therefore, not the subject of a deduction. In any event, however, appellant would have been obliged to pay the mortgage, not being a purchaser in good faith.

CONCLUSION

The fact that appellant now brings an independent action, framing it on the theory of unjust enrichment, does not in any manner detract from the proposition that the original matter has been fully and completely adjudicat-

ed. Notwithstanding its contention that it was lulled into error by the trial court (with which contention we are wholly unable to agree), let us remember that instructions are given at the close of a case, after the evidence is submitted. It is always up to counsel to submit his evidence; whereupon the court instructs the jury. For some reason best known to itself, appellant failed to make any proof other than the fact that a mortgage existed—at a time when it was fully possessed and apprised of all of the evidence which it now pleads.

If cases are to be tried piecemeal in this fashion, there is nothing to prevent a situation like this: Plaintiff sues defendant on a promissory note. Defendant has a defense of payment and the statute of limitations. To simplify the trial of the action he relies entirely upon the statute of limitations. The court sustains the defense on this theory, but on appeal to the Supreme Court it is reversed and judgment is ordered for the full amount against the defendant. Defendant then pays the judgment but then maintains an action against the plaintiff to recover the sums which he has paid on the theory that, having paid twice, there has been an unjust enrichment. The position would be untenable. 13 ALR 1151.

There are instances, of course, where the doctrine of res judicata can and does have harsh results. In fact, every case involving res judicata which we have submitted involves hardship. The courts, however, have recognized consistently that there must be an end to actions and to litigation and it is the duty of a party to avail himself of all of his rights or defenses in the original action. Ap-

pellant's argument is threaded throughout with the claim of hardship which will result. The dead man's statute, the statute of limitations, and the statute of frauds can and do certainly result in equally harsh results. Nevertheless, the fact remains that they are rules and the law must survive, notwithstanding unfortunate applications of its principles.

Respectfully submitted,

THOMAS MALOTT,
Attorney for Appellee.